

1 probe you about is the fact that you are absolutely clear  
2 that this subject was discussed for the first time with Mr.  
3 Price at the conference at four in the afternoon, and the  
4 reason that you are absolutely clear about that is because  
5 it was such a significant piece of information.

6 And yet you are having difficulty reconstructing  
7 what transpired at the conference.

8 THE WITNESS: I don't place a great deal of  
9 emphasis on somebody handing me a piece of paper as I walk  
10 into a conference room. It doesn't register, and to recall  
11 almost two years later that this was given to me at four  
12 o'clock, or 4:30.

13 JUDGE SIPPEL: All right. But your testimony  
14 today was that it was -- that you were into the conference  
15 call, and I am not going to try and say how many minutes,  
16 but that you were -- it was more than just an opening  
17 statement in the conference call. You had been talking for  
18 some time with Mr. Price before this subject came up.

19 THE WITNESS: I believe that's right. It wasn't  
20 the opening. If anything, I think it might have been more  
21 towards the end.

22 JUDGE SIPPEL: And how long was the subject  
23 discussed in the context of what is reflected in the memo,  
24 and the efforts that you made to -- you as collectively --  
25 to communicate the situation with Mr. Price? How long did

1 that take?

2 THE WITNESS: I think that it was several or more  
3 minutes.

4 JUDGE SIPPEL: And the upshot of that telephone  
5 conversation was to defer disclosure to the FCC, and seek  
6 more information?

7 THE WITNESS: Correct.

8 JUDGE SIPPEL: And I heard you testify that that  
9 was Mr. Price's decision?

10 THE WITNESS: I think it was Mr. Price and Mr.  
11 Constantine, who both wanted to do a little investigating  
12 before any hasty type of action was taken.

13 JUDGE SIPPEL: Did anybody else participate in  
14 that decision?

15 THE WITNESS: Well, again, Mr. Rivera was there,  
16 and Larry Solomon may or may not have been there. I really  
17 don't recall. So to the extent that we were all there, I  
18 think everybody participated in the decision.

19 JUDGE SIPPEL: All right. That's all I have. Any  
20 redirect?

21 MR. SPITZER: Yes, Your Honor. Just two questions  
22 if I might.

23 REDIRECT EXAMINATION

24 BY MR. SPITZER:

25 Q As you sit here today, Mr. Barr, do you believe

1 that it would have been preferable to disclose in the May 4  
2 STAs the fact of the premature service?

3 A Clearly.

4 Q And finally was it ever your intent to be less  
5 than forthcoming and full in your disclosures and comments  
6 to the Commission with respect to the statements that you  
7 made?

8 A It was never my intent to be anything but  
9 forthcoming.

10 Q And as you sit here today with a broader  
11 information base, and reexamine these documents, do you see  
12 certain statements that were not entirely correct in  
13 retrospect?

14 A Yes. I think Liberty endeavored to be  
15 forthcoming, but as time went on, and as you look back, you  
16 can say, well, what I knew then isn't what I knew today, and  
17 if I knew today what I knew then, I would have said  
18 something differently.

19 Q Do you know when you first saw what is Time Warner  
20 Cablevision Exhibit 35 in your conversations with counsel?

21 A Do I recall when I first saw this?

22 Q That's correct.

23 A 35? It would have been at Henry Rivera's offices.

24 Q Subsequent to that you were asked a question by  
25 Mr. Weber about conversations with counsel. Do you recall

1     when you next saw that document; and not in the events of  
2     April of 1995?

3             A     I don't think it was until recently.

4             Q     Can you put a time frame on recently?

5             A     I think this week or last week.

6                   MR. SPITZER: Thank you. I have nothing further,  
7     Your Honor.

8                   JUDGE SIPPEL: I have nothing further. Does  
9     somebody else have anything more based on redirect?

10            MR. WEBER: I have one question, Your Honor.

11            JUDGE SIPPEL: Mr. Weber.

12                                 RECROSS EXAMINATION

13            BY MR. WEBER:

14            Q     With this Time Warner Exhibit Number 35, you  
15     stated that you just -- that you believe that you just saw  
16     it in the last week or so. Is it your testimony then that a  
17     copy of this memo was not kept after that conference call,  
18     after that meeting with Mr. Constantine and Mr. Rivera?

19            A     Well, obviously somebody kept a copy. I'm not  
20     sure that I kept a copy.

21            Q     Can you recall if there was a reason why you  
22     didn't keep a copy? I guess more specifically --

23            A     Well, I didn't say that I didn't keep a copy. I  
24     might have kept a copy as well, but it doesn't mean that I  
25     looked at it with any degree of regularity, such that I can

1 recall every time that I looked at it.

2 Q If you kept a copy would it have been put into the  
3 1808 file?

4 A Again, my general practice is to place items that  
5 I receive into the relevant files.

6 Q You don't recall anybody at that particular  
7 meeting saying this document is not to leave this meeting do  
8 you?

9 A No.

10 MR. WEBER: Nothing further.

11 JUDGE SIPPEL: You have no -- well, I'm not going  
12 to ask you if you had any recollection, but did you after  
13 the meeting inquire of Mr. Lehmkuhl about this situation,  
14 and showed him a copy; that is, your copy of Exhibit 35?

15 THE WITNESS: Well, again, I don't recall advising  
16 Michael at that point in time.

17 JUDGE SIPPEL: Why? Why would you not advise him?

18 THE WITNESS: Pardon?

19 JUDGE SIPPEL: Why would you not do that? It  
20 would seem to me that that would be the most logical thing  
21 to do; pick it up and go back to the office, and say, you  
22 know, Mr. Lehmkuhl, or Michael, what is this?

23 THE WITNESS: What is --

24 JUDGE SIPPEL: Yeah. I mean, you had -- he is the  
25 one that was doing the licensing, and he was the one that

1 was much closer to the situation than you were. He is  
2 practicing law with you in the same law firm. It would be a  
3 perfectly logical thing to do.

4 THE WITNESS: Well, I think you're right. He was  
5 doing the licensing, but that's all he was doing. He wasn't  
6 involved with the contracting, and he wasn't involved with  
7 confirming or denying Liberty's ability to commence service  
8 to a particular location.

9 JUDGE SIPPEL: But according to Exhibit 44, he was  
10 on the phone a fair amount of time with Mr. Nourain over  
11 this period of time.

12 THE WITNESS: Over this period of time, and  
13 probably --

14 JUDGE SIPPEL: From January until April.

15 THE WITNESS: No, I was saying over that period of  
16 time and probably beginning with the period of time he came  
17 to the law firm.

18 JUDGE SIPPEL: Well, my point is that information  
19 such as that, and in light of the significance of what  
20 transpired in that conference call, and here is the  
21 information that is handed to you, it is as the night  
22 follows the day, it would just seem sheer logic that you  
23 would go back and talk to Mr. Lehmkuhl about it in some way,  
24 shape, or form. If not, call him up and meet him at the  
25 office on a Saturday morning.

1 I mean, it's just that I am having difficulty with  
2 how this Exhibit 35 all of a sudden left the scene after the  
3 meeting of April 27th, and doesn't show up again until last  
4 week.

5 THE WITNESS: I just don't have a specific  
6 recollection of talking with him about it.

7 JUDGE SIPPEL: Did you consider this to be  
8 significant information; that is, the document as Exhibit  
9 35, at the time that you received it at the conference? Was  
10 this significant information to you?

11 THE WITNESS: I considered more significant the  
12 information that Liberty was potentially operating without  
13 authority, and this specific memorandum, I don't think I  
14 attributed nearly as much significance to.

15 JUDGE SIPPEL: Well, if that was more significant  
16 that they were operating without authority, then why would  
17 the decision be made to not inform the Commission, but to  
18 get more facts and information based upon what you have  
19 learned in the April 26th memo. I mean, again, that doesn't  
20 -- the logic on that doesn't flow at all.

21 THE WITNESS: I didn't understand.

22 JUDGE SIPPEL: Well, you said that the most  
23 significant thing to you was the fact that you had learned  
24 that there were unauthorized activations.

25 That was more significant to you than the

1 information that is contained in Exhibit 35, which as I  
2 understand the testimony here has been was the most  
3 significant lead on April 27th, in addition to, of course,  
4 Mr. Price's conversation. That focused on the unauthorized  
5 activations.

6 THE WITNESS: Well, to me, standing alone, this  
7 document is fairly meaningless.

8 JUDGE SIPPEL: Exactly. And Mr. Lehmkuhl would be  
9 the logical connection. I mean, isn't that logical? I  
10 mean, you had to go to different sources to really bring the  
11 significance out of this document. You had agreed with Mr.  
12 Price and Mr. Constantine that there would be an  
13 investigation, and yet as I said before, this document has  
14 absolutely no connection between you and Mr. Lehmkuhl  
15 between April 27th and last week according to your  
16 recollection anyway. And, I mean, I just find that  
17 troubling.

18 THE WITNESS: I just don't know how to respond,  
19 Your Honor.

20 JUDGE SIPPEL: What can you tell me -- I'm sorry,  
21 I didn't mean to cut you off. Do you want to offer  
22 anything? I am simply trying to ask you to explain as best  
23 you can, is what you did with this memo between the time of  
24 the meeting and last week.

25 THE WITNESS: I'm not sure that I did anything in

1 particular with this memo, because again this memo is merely  
2 a list of locations. It doesn't contain any other real  
3 information standing alone.

4 JUDGE SIPPEL: Well, I don't want -- you know, I  
5 don't want to engage in an argument with you, but I am  
6 certainly trying to give you my views, in terms of how I  
7 find this account with respect to how this information was  
8 handled between the 27th of April and now.

9 I am talking about the memo itself, which from all  
10 the testimony today with respect to that April 27th meeting,  
11 was the focal, the focal point of the conversation with Mr.  
12 Price, which led you to the conclusion that we are not going  
13 to tell the FCC about this now. We are going to get more  
14 information.

15 And this is the document that is going to be the  
16 start of that inquiry.

17 THE WITNESS: Well, I think that is probably a  
18 fair characterization, yes.

19 JUDGE SIPPEL: And yet it never went with you back  
20 to the firm to talk to Mr. Lehmkuhl about it at that time?

21 THE WITNESS: Again, I don't have a specific  
22 recollection of that.

23 JUDGE SIPPEL: All right. Is there anything more  
24 that you wish to ask of this witness?

25 MR. SPITZER: Nothing further, Your Honor.

1 JUDGE SIPPEL: All right. Then that concludes the  
2 testimony. You are excused as a witness, but I do have to  
3 take a look at this document. So, it is possible that you  
4 would be called back to testify about it, particularly since  
5 it relates to the April 27th meeting.

6 And in that event, or because of that possibility,  
7 my sequestration order with respect to yourself is still in  
8 effect.

9 THE WITNESS: I understand.

10 JUDGE SIPPEL: In fact, it will be in effect with  
11 respect to all these witnesses until -- you know, and at an  
12 appropriate time we will put an end to that, but for the  
13 time being anyway. Then you are excused as a witness.

14 THE WITNESS: Thank you, Your Honor.

15 JUDGE SIPPEL: Let's go off the record.

16 (Brief recess.)

17 JUDGE SIPPEL: We're going to start. This is  
18 really a document production session at this point, and you  
19 have referred us to the first item of business, Mr. Beckner,  
20 is that you are asking for a ruling with respect to your  
21 Exhibit 13, which is the affidavit that has been arraigned  
22 in the New York actio

23 MR. BECKNER: That's correct, Your Honor.

24 JUDGE SIPPEL: And that was identified earlier,  
25 but not received in evidence, and it was to be reoffer

1 MR. BECKNER: That is correct, Your Honor.

2 JUDGE SIPPEL: And you are representing that he  
3 has testified to this, some of the information in this  
4 document in relation to the issue that we are trying he

5 MR. BECKNER: Yes, Your Honor. There is --

6 JUDGE SIPPEL: All right. We understand that.  
7 Let me just ask Mr. Spitzer and Mr. Holt, do you have any  
8 objection to this?

9 MR. SPITZER: No, we won't at this point object.  
10 I think it is just a matter of expediting, and it makes more  
11 sense to admit it. We obviously stand by our prior view  
12 about its relevance and its probative value, but I think  
13 that is a matter that can be argued in our proposed findings  
14 of fact and conclusions of law.

15 So, rather than go through that here, we won't  
16 oppose it, and we will just argue its relevance later on if  
17 necessary.

18 JUDGE SIPPEL: All right. I'm very sensitive to  
19 it because of what I said earlier. I don't want that issue  
20 to creep into -- I mean, I don't want a franchise issue, or  
21 the cable rule, to creep into this issue. But, okay, with  
22 that caution, and without objection, previously identified  
23 Time Warner TWCV Number 13 is received in evidence at this  
24 time.

25 //

1 (The document referred to was  
2 received into evidence as  
3 TWCV No. 13.)

4 JUDGE SIPPEL: And I believe -- and again  
5 following up all we discussed off the record, that you are  
6 next, Mr. Beckner, going to have marked as the next numbered  
7 exhibit the deposition of Mr. Edward Millstein of May 30th,  
8 1996; is that correct?

9 MR. BECKNER: That's correct, Your Honor. I have  
10 given the court reporter two copies of the complete  
11 transcript.

12 JUDGE SIPPEL: And by my count that is TWCV Number  
13 46 for identification, correct?

14 MR. BECKNER: That's correct, sir.

15 JUDGE SIPPEL: Then the reporter will so mark that  
16 document, which is Mr. Millstein's testimony in his  
17 deposition of May 30th, 1996 as TWCV Number 46 for  
18 identification. Mr. Spitzer, is there any objection?

19 MR. SPITZER: No objection, Your Honor.

20 JUDGE SIPPEL: It is received in evidence as  
21 Number 46.

22 (The document referred to was  
23 marked for identification and  
24 entered into evidence as TWCV  
25 Exhibit No. 46.)

1 JUDGE SIPPEL: And as I have indicated off the  
2 record, and this is true with respect to all of the evidence  
3 that has been introduced, marked and introduced in this  
4 case, there will be on confidential treatment given to this  
5 evidence, even though the deposition itself was taken with a  
6 confidential logo on it.

7 Next we have some documents from Mr. Holt that  
8 were used yesterday. These are recently produced documents  
9 which were used for the first time with Mr. Ontiveros  
10 yesterday. And I know that we have not had a change to get  
11 these photocopied beyond what you have, but you take the  
12 document one at a time.

13 These have all been testified to by Mr. Ontiveros;  
14 is that correct?

15 MR. HOLT: I believe so, Your Honor, yes.

16 JUDGE SIPPEL: Well, let's take them one at a  
17 time, and let's get them stamped and identified by the  
18 reporter, and then we will act on them.

19 MR. HOLT: Okay. The first is a document that  
20 should be marked for identification as Time Warner  
21 Cablevision Exhibit 47.

22 MR. HOLT: It is a 9-page document that begins  
23 with a fax transmittal page to Behrooz Nourain on the  
24 letterhead of Liberty Cable, and proceeds to the --

25 JUDGE SIPPEL: What is the date on that?

1 MR. HOLT: -- 9th page. I'm sorry. It appears to  
2 be 8/14/95.

3 JUDGE SIPPEL: I'm sorry, but give that date  
4 again, please?

5 MR. HOLT: 8/14/95.

6 JUDGE SIPPEL: Okay. And it was to Mr. Nourain  
7 from whom?

8 MR. HOLT: Diane Pennington, P-E-N-N-I-N-G-T-O-N.

9 JUDGE SIPPEL: Okay. Would you pass that up to  
10 the reporter and let him stamp it with the exhibit number.

11 MR. HOLT: Can I stand next to the reporter?

12 JUDGE SIPPEL: Certainly, yes. Come right up.  
13 The reporter will mark that 9-page document as you have  
14 described it, Mr. Holt, as TWCV Number 47 for  
15 identification.

16 (The document referred to was  
17 marked for identification as  
18 TWCV Exhibit No. 47.)

19 JUDGE SIPPEL: And, Mr. Spitzer, did you want to  
20 see that document?

21 MR. SPITZER: Well, sure, if I can for a moment.  
22 I think I recall it. It is the ABCD list, with slightly  
23 different redactions; isn't that correct? We have no  
24 objections, Your Honor.

25 JUDGE SIPPEL: Thank you.

1 MR. SPITZER: It is merely a duplicate of what is  
2 already in evidence.

3 JUDGE SIPPEL: I recall your point yesterday on  
4 that. Very well then. Without objection, it is received in  
5 evidence at this time as TWCV 47.)

6 (The document referred to was  
7 entered into evidence as TWCV  
8 Exhibit No. 47.)

9 JUDGE SIPPEL: Now, the next document which you  
10 are going to ask the reporter to mark.

11 MR. HOLT: The second is an incident report. It  
12 is a one-page document that we would like to have marked as  
13 Time Warner Cablevision Exhibit 48. It is an incident  
14 report, dated June 24th to June 30th, 1995.

15 JUDGE SIPPEL: I'm sorry, dated June what?

16 MR. HOLT: 24 to June 30th, 1995. And Mr.  
17 Ontiveros was questioned by me about the entry, the entries  
18 that were placed in the third set of boxes on that document.

19 JUDGE SIPPEL: All right. Let's have the reporter  
20 mark that for identification then as you have described it,  
21 as TWCV Number 48 for identification, and let's show it to  
22 Mr. Spitzer quickly.

23 (The document referred to was  
24 marked for identification as  
25 TWCV Exhibit No. 48.)

1           MR. SPITZER: Your Honor, I think we do object to  
2   this one, because it is irrelevant from our perspective, and  
3   I believe that the testimony that was elicited with respect  
4   to this document ended up establishing the fact, and Mr.  
5   Holt will correct me if I am wrong, but with his initial  
6   impression that perhaps the transmitter replacement that he  
7   inquired about was in fact evidence that there was a direct  
8   microwave -- that there was direct microwave service to  
9   Lincoln Harbor.

10           He was mistaken in that view, and that the  
11   transmitter that was replaced was somewhere earlier on in  
12   the chain of progression of links that provided service to  
13   the site at issue. I just don't think it relates to  
14   anything in this hearing.

15           It doesn't go to candor, and it doesn't go to the  
16   date that service was initiated. So, it is not an issue of  
17   great moment, but we simply believe that the evidence in  
18   fact, and that the testimony itself establishes that this  
19   document was irrelevant.

20           JUDGE SIPPEL: Mr. Weber.

21           MR. WEBER: I have to concur with Mr. Spitzer on  
22   that, that the testimony did show that there is no  
23   transmitter link to Lincoln Harbor. That it is a hard wired  
24   connection, and the hard wired connections are not a part of  
25   this proceeding, or of this mini-proceeding.

1 JUDGE SIPPEL: All right. Mr. Holt, you have the  
2 last word on this.

3 MR. HOLT: Your Honor, I don't have anything to  
4 add. I am marking these documents for identification per  
5 your request. I am not sure whether I need to offer them  
6 into evidence.

7 JUDGE SIPPEL: Well, they have been testified to,  
8 and so I certainly want them somehow in the record. But if  
9 you are not sponsoring this document, it is going to be  
10 rejected on grounds of relevancy, along with what Mr.  
11 Spitzer said. But I think again for purposes of the record  
12 so that somebody can determine after the fact what people  
13 are testifying to, these should be in the record.

14 MR. HOLT: I agree, Your Honor.

15 (The document referred to was  
16 rejected as Exhibit No. 48.)

17 JUDGE SIPPEL: So, the next document that you are  
18 going to have marked? Your next document, Mr. Holt?

19 MR. HOLT: It is a one page document, Your Honor,  
20 that bears the label, Distribution Schedule. It identifies  
21 the number of paths at issue in this proceeding, and --

22 JUDGE SIPPEL: What is the date of it?

23 MR. HOLT: It has a date on the bottom right-hand  
24 corner. I'm not sure if that is the date of the document or  
25 whether a box was rejected, but it simply says July 6, '94.

1 JUDGE SIPPEL: July 6th, '94?

2 MR. HOLT: Right. I don't believe that is  
3 actually the date of the document. I think the document is  
4 undated.

5 JUDGE SIPPEL: But it identifies paths that are in  
6 issue in this proceeding?

7 MR. BECKNER: Yes, it does, Your Honor.

8 MR. HOLT: And some of the paths that I think are  
9 associated with the applications that were filed in '

10 MR. BECKNER: Well, in particular, it identifies  
11 the Wells Hotel, which is one path that was activated in  
12 July of '94, and the application wasn't filed for that until  
13 July of '95. And that's listed on the HDO.

14 JUDGE SIPPEL: All right. Well, wait just as  
15 second. Let's go off the record.

16 (Discussion off the record.)

17 JUDGE SIPPEL: All right. As you have identified  
18 that one page document, Mr. Holt, I am going to have the  
19 reporter mark that at this time as TWCV Number 49 for  
20 identification.

21 (The document referred to was  
22 marked for identification as  
23 TWCV Exhibit No. 49.)

24 MR. HOLT: Yes, Your Honor, and there was a  
25 substantial -- or at least a fair amount of testimony

1 provided by Mr. Ontiveros about his practice of preparing  
2 this sort of document in conjunction with meetings with the  
3 operations staff, and there was testimony about this  
4 specific document, and some notations that were made by Mr.  
5 Ontiveros on the document.

6 JUDGE SIPPEL: All right. I think I recall that.  
7 Any objections, Mr. Spitzer?

8 MR. SPITZER: Well, I would only observe that the  
9 volume of testimony doesn't necessarily demonstrate  
10 relevance, but despite that, we won't object, because we  
11 just don't see it as not worth fussing over, Your Hon

12 MR. BECKNER: We would indicate that we don't  
13 think it is relevant, and we will have no objection.

14 JUDGE SIPPEL: All right. Well, that's generous,  
15 and I will take it that way. It is received in evidence as  
16 your Number 49.

17 (The document referred to was  
18 admitted into evidence as TWCV  
19 Exhibit No. 49.)

20 JUDGE SIPPEL: Now, let's go off the record a  
21 minute.

22 (Discussion off the record.)

23 JUDGE SIPPEL: Back on the record. Mr. Holt, I  
24 understand now that you have got three additional documents  
25 that you are simply going to identify for the record, but

1 they are not going to be offered into evidence?

2 MR. HOLT: That's correct, Your Honor. The first  
3 is a three paged document, entitled -- in other words, it is  
4 a memorandum, dated July 6th, 1995, from Behrooz Nourain to  
5 Peter Price, regarding the utilization of labor systems. We  
6 would like to have that marked for identification as Time  
7 Warner Cablevision Exhibit 50.

8 JUDGE SIPPEL: Well, we don't even have to  
9 identify it. You are not offering that; is that correct?

10 MR. HOLT: Correct.

11 JUDGE SIPPEL: All right. You have described it  
12 for the record, and that is good enough. What is the next  
13 one that you are going to do?

14 MR. HOLT: The second document is a two page  
15 document, and again it is a memorandum to Mr. Ontiveros from  
16 Drew Bailey, dated June 14th, 1995. The subject is the  
17 review of customer database.

18 JUDGE SIPPEL: All right. And that is not going to  
19 be offered, and so that doesn't need to be marked. And what  
20 is the third document that you have?

21 MR. HOLT: And the final document is a memorandum  
22 dated September 16th, 1993, from Kimberly Kakerbeck,  
23 K-A-K-E-R-B-E-C-K, to Doron Glazer, D-O-R-O-N G-L-A-Z-E-R.

24 JUDGE SIPPEL: Okay. And again that was testified  
25 to to some extent by Mr. Ontiveros, and it is not being

1 offered into evidence. That concludes all the documents?

2 MR. HOLT: Yes, Your Honor.

3 JUDGE SIPPEL: All right. Let's go off the  
4 record.

5 (Brief recess.)

6 JUDGE SIPPEL: We are back on the record, and I  
7 want to commend counsel and the reporter, particularly, for  
8 cooperating with this, but we have gotten a lot of documents  
9 under control in the last 20 minutes or so; with the last  
10 document that has been received in evidence, Number 49, TWCV  
11 Number 49.

12 The only document now that is left to consider is  
13 the one -- the handwritten notes of Mr. Barr that were  
14 identified in his testimony. And I am sure that that will  
15 come to me very rapidly in the next day or so. What I have  
16 that I want to focus on with respect to proposed findings,  
17 I've got those dates, and I am going to get an order out on  
18 those.

19 But I again want to -- I do want that question  
20 addressed with respect to the unavailability of the internal  
21 audit report, as to whether or not this case can be --  
22 whether this case can be resolved without that evidence,  
23 particularly since the Commission has considered that  
24 evidence in setting this case down for a hearing.

25 And it has already been -- well, that's all that I

1     need to say about that. The other thing that I want to be  
2     sure that you focus on are the relevant parts of the  
3     character qualifications statement of the Commission at 102  
4     FCC 2nd, starting at 1179.

5             I know that is mainly with respect to concurrent  
6     cases, but there is language in there with respect to the  
7     Commission's policy on how it reviews or views candor  
8     misrepresentation, and such other things as flagrant  
9     disregard of Commission's rules and policies.

10            Third thing that I want -- well, we have talked  
11     about -- I have already talked about the need to be sure  
12     that our docket section at the Commission is satisfied with  
13     how to handle the evidence in the case as public  
14     information. And that's all that I have.

15            Now, I do have one other mechanical thing, but I  
16     am going to talk to you about that off the record. Does  
17     anybody have anything more they want to say about these  
18     instructions? Mr. Beckner?

19            MR. BECKNER: Well, I don't know whether it is  
20     about the instructions. There is an issue that I was  
21     discussing briefly with Mr. Holt, and that he may have  
22     discussed with Mr. Weber. Liberty is now allowed a great  
23     deal of testimony about certain communications between  
24     itself and its attorneys.

25            And I think that the privilege log which was put

1 together this past spring reflects a somewhat different view  
2 or different assertion of the privilege than the company is  
3 now taking.

4 And the question that I was going to ask is  
5 whether or not Liberty would be willing to revisit the  
6 privilege log with respect not to everything that's in it,  
7 but with respect to documents that are identified in it  
8 involving either Mr. Barr or Mr. Price, with dates between  
9 January 1, '95 and July 31, '95, which is basically the time  
10 period which has been encompassed by the testimony at the  
11 hearing.

12 And the reason that I say this is that it may be -  
13 - and frankly we haven't gone through the log ourselves, but  
14 it may be that in fact documents that they claim the  
15 privilege for this spring that they have now in effect by  
16 allowing this testimony have waived the privilege. And it  
17 might shed some light on some of the matters that were the  
18 subject of today's examination, for example.

19 JUDGE SIPPEL: Well, if you are going to argue  
20 waiver, you are going to have to file a motion on that. I  
21 wouldn't expect them to concede waiver. But what would your  
22 -- how do you feel about this, the idea of reconsidering  
23 claims of privileges as he has indicated, and letting us  
24 look at the documents?

25 MR. SPITZER: I think we have to think about it,

1 Judge.

2 JUDGE SIPPEL: All right. Mr. Weber?

3 MR. WEBER: Well, you know, I was thumbing through  
4 this during the testimony today, and by this I mean the  
5 privilege log, both during the testimony today and some just  
6 at this moment, and there are a handful of documents which  
7 are very close to this relevant time period, being April/May  
8 1995.

9 And some of them are by Mr. Barr, or by Mr. Price  
10 to Mr. Barr, and that I would maybe like them to look at  
11 those documents again to determine whether or not the  
12 privilege has been waived by Mr. Barr's testimony here  
13 today.

14 JUDGE SIPPEL: Well, all right. Well, at least  
15 Mr. Spitzer has said that he will -- that he is going to  
16 consider it, will consider the subject. What I will do is  
17 give you 10 days to negotiate this, and if you can't come to  
18 a conclusion within 10 days, you have the right to file a  
19 motion. And we will just take it one step at a time.

20 MR. BECKNER: That's fine, Your Honor. I mean,  
21 perhaps the Bureau, and Time Warner, and Cablevision, can  
22 send Mr. Spitzer a list after we have a chance to go through  
23 with this, and then he can consider that list, and maybe  
24 that is one way that we can approach it.

25 JUDGE SIPPEL: All right. If you don't have it

1 resolved by -- well, the 7th is on a Friday. If you don't  
2 have it resolved by Friday, then the motion will have to be  
3 filed by the 10th, which is Monday, by the close of  
4 business. All right. Does anybody else have anything in  
5 addition to that that they want to bring up?

6 MR. WEBER: I guess just one issue relating to  
7 your first instruction of the proposed findings, and that's  
8 commenting on how this case can go, and whether this case  
9 can go to summary decision without you having the benefit of  
10 seeing the audit report.

11 And I hope that you realize the Bureau's response  
12 may have to be a little bit cryptic on that very point  
13 because we have seen the audit report. However, you know,  
14 Judge, from the Court of Appeals ruling, or their stay on  
15 the release of it, we really can't disclose what is in it.

16 JUDGE SIPPEL: No.

17 MR. WEBER: And therefore we obviously are going  
18 to have to be very cryptic by not revealing any of the  
19 information in it.

20 JUDGE SIPPEL: I am not asking for disclosure of  
21 anything in it.

22 MR. WEBER: No, I understand.

23 JUDGE SIPPEL: I know enough from Mr.  
24 Constantine's affidavit, in terms of what -- I have a good  
25 concept globally what is there. What I don't know is